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BRIEFS

Nos. 09-958, 09-1158, and 10-283

Supreme Court, U.S.
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In the

Supreme Court of the United States

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., A Nonprofit Corporation, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, et al.,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, et al.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Under the Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), a state that accepts federal Medicaid funds must adopt a state plan containing methods and procedures to "safeguard against unnecessary utilization of . . . [Medicaid] services and . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available . . . at least to the extent that such care and services are available to the general population." The Ninth Circuit, along with virtually all of the circuits to have considered the issue since this Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), concluded that this provision is not privately enforceable by providers or beneficiaries under 42 U.S.C. § 1983, *inter alia*, because it does not confer any "rights" on providers or beneficiaries, and because it requires balancing of indeterminate and potentially conflicting policy objectives that are "ill-suited" for judicial enforcement. Nonetheless, the Ninth Circuit held that such considerations were irrelevant in the present cases, where respondents are proceeding under the Supremacy Clause rather than under § 1983.

The question presented is:

Whether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 30(A) by asserting that the provision preempts a state law that may reduce payments to providers?

LIST OF PARTIES

No. 09-958 (*Indep. Living*)

Petitioner is Toby Douglas (formerly David Maxwell-Jolly), Director of the Department of Health Care Services, State of California (DHCS).

Respondents who were plaintiffs-appellees below are Independent Living Center of Southern California, Inc., a nonprofit corporation; Gray Panthers of Sacramento, a nonprofit corporation; The Gray Panthers of San Francisco, a nonprofit corporation; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; Mark Beckwith; Margaret Dowling; and Tran Pharmacy, Inc., a corporation d/b/a Tran Pharmacy.

Respondents who were intervenor-appellees below are Sacramento Family Medical Clinics, Inc.; Theodore M. Mazer, M.D.; Ronald B. Mead, D.D.S.; and Acacia Adult Day Services.

No. 09-1158 (*Cal. Pharm.*)

Petitioners are Toby Douglas (formerly David Maxwell-Jolly), Director of DHCS; William Lightbourne (formerly John A. Wagner), Director of the Department of Social Services, State of California; and Edmund G. Brown Jr. (formerly Arnold Schwarzenegger), Governor of the State of California.

California Pharmacists respondents are California Hospital Association; Sharp Memorial Hospital; Grossmont Hospital Corporation; Sharp Chula Vista

LIST OF PARTIES – Continued

Medical Center; Sharp Coronado Hospital and Healthcare Center; Acacia Adult Day Services; California Association for Adult Day Services; Fe Garcia; and Charles Gallagher.[1]

Independent Living respondents are Independent Living Center of Southern California, Inc., a nonprofit corporation; Gerald Shapiro, Pharm.D., d/b/a Uptown Pharmacy and Gift Shoppe; Sharon Steen, d/b/a Central Pharmacy; and Tran Pharmacy, Inc., d/b/a Tran Pharmacy.

Dominguez respondents are Lydia Dominguez (now deceased); Patsy Miller; Alex Brown, by and through his mother and next friend Lisa Brown; Donna Brown; Chloe Lipton, by and through her conservator and next friend Julie Weissman-Steinbaugh; Herbert M. Meyer; Leslie Gordon; Charlene Ayers; Willie Beatrice Sheppard; Andy Martinez; Service Employees International Union United Healthcare Workers West; Service Employees International Union United Long-Term Care Workers; Service Employees International Union Local 521;

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[1] The petition named an additional six respondents: the California Pharmacists Association, California Medical Association, California Dental Association, Marin Apothecary, Inc. d/b/a Ross Valley Pharmacy, South Sacramento Pharmacy, and Farmacia Remedios, Inc. Those entities were plaintiffs in the district court, but were not parties in the court of appeals, and thus are not respondents under this Court's Rule 12.6.

LIST OF PARTIES – Continued

and Service Employees International Union California State Council.

No. 10-283 (*Santa Rosa*)

Petitioner is Toby Douglas (formerly David Maxwell-Jolly), Director of DHCS.

Respondents are Santa Rosa Memorial Hospital; St. Helena Hospital; Queen of the Valley Medical Center; Central Valley General Hospital; San Joaquin Community Hospital; San Antonio Community Hospital; Children's Hospital at Mission; Saddleback Memorial Medical Center; Orange Coast Memorial Medical Center; Anaheim Memorial Medical Center; Hoag Memorial Hospital Presbyterian; Heart Hospital of BK, LLC; John Muir Health; SRM Alliance Hospital Services; Lancaster Hospital Corporation; Fountain Valley Regional Hospital and Medical Center; and Mission Hospital Regional Medical Center.

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OPINIONS BELOW

No. 09-958 (*Indep. Living*). This petition seeks review of two opinions of the Ninth Circuit Court of Appeals, one reported at 572 F.3d 644, *Indep. Living* Pet. App. 1, and one not reported, *id.* at 54. A prior Ninth Circuit opinion in the case is reported at 543 F.3d 1050, *Indep. Living* Pet. App. 58. The district court opinions that led to the Ninth Circuit decisions, *id.* at 94, 125, 127, 133, are unreported.

No. 09-1158 (*Cal. Pharm.*). This petition seeks review of four opinions issued by the Ninth Circuit on March 3, 2010. Two of the opinions are reported, 596 F.3d 1098 and 596 F.3d 1087. *Cal. Pharm.* Pet. App. 1, 59. Two of the opinions are not reported. *Id.* at 37, 53. In one of the appeals, *see id.* at 37, the Ninth Circuit previously had issued an order granting an injunction pending appeal, *id.* at 42, which is reported at 563 F.3d 847. Three of the district court opinions that led to the Ninth Circuit decisions, *Cal. Pharm.* Pet. App. 84, 106, and 128, are reported at, respectively, 630 F. Supp. 2d 1144, 630 F. Supp. 2d 1154, and 603 F. Supp. 2d 1230, while the remainder are not reported. *Cal. Pharm.* Pet. App. 152, 161, 176, 178, 180.

No. 10-283 (*Santa Rosa*). This petition seeks review of an unreported decision of the Ninth Circuit. *Santa Rosa* Pet. App. 1. The district court orders that led to the Ninth Circuit's opinion also are unreported. *Id.* at 5, 7, 9.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit issued the opinions at issue in No. 09-958 (*Indep. Living*) on July 9, 2009 and August 7, 2009, and denied the Department of Health Care Service's (DHCS's) Petitions for Rehearing and Rehearing En Banc on, respectively, October 29, 2009 and September 23, 2009. The petition was timely filed on February 16, 2010, following orders extending the time to file.

The Ninth Circuit issued the four opinions at issue in No. 09-1158 (*Cal. Pharm.*) on March 3, 2010, and the petition for writ of certiorari was filed on March 24, 2010.

The Ninth Circuit issued the opinion at issue in No. 10-283 (*Santa Rosa*) on May 27, 2010, and the petition for writ of certiorari was filed on August 25, 2010.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., art. VI, cl. 2.

The Medicaid Act, 42 U.S.C. § 1396a(a)(30)(A), states in pertinent part:

> (a) Contents
>
> A State plan for medical assistance must –
>
> * * *
>
> (30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area . . . .

The state statutory reductions at issue are reproduced in the appendices to the petitions for certiorari in these consolidated cases, as follows:

No. 09-958 (*Indep. Living*)

Cal. Welf. & Inst. Code § 14105.19(b)(1) (enacted Feb. 16, 2008), reproduced at *Indep. Living* Pet. App. 158; *see also Indep. Living* Pet. App. 162.

No. 09-1158 (*Cal. Pharm.*)

Cal. Welf. & Inst. Code § 14105.191(b)(2)(F) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 205-06 (at issue in 9th Cir. No. 09-55532).

Cal. Welf. & Inst. Code §§ 14105.191(b)(1), 14105.191(b)(2)(B), (D), (E), 14166.245(b)(2)(A), (c)(3)(B) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 205-06, 211, 213-14 (at issue in 9th Cir. No. 09-55365).

Cal. Welf. & Inst. Code § 14105.191(b)(3) (enacted Sept. 30, 2008), reproduced at *Cal. Pharm.* Pet. App. 206 (at issue in 9th Cir. No. 09-55692).

Cal. Welf. & Inst. Code § 12306.1(d)(6) (enacted Feb. 20, 2009), reproduced at *Cal. Pharm.* Pet. App. 224 (at issue in 9th Cir. No. 09-16359).

No. 10-283 (*Santa Rosa*)

Cal. Welf. & Inst. Code § 14166.245(b), (c)(3) (enacted Feb. 16, 2008), reproduced in *Santa Rosa* Pet. App. 25-26; *see also Santa Rosa* Pet. App. 28, 31, 35, 38.

STATEMENT OF THE CASE

Facing a devastating, ongoing, and deepening financial crisis, the California Legislature enacted a series of statutory reforms directed towards reducing the costs and increasing the efficiency of the State's Medicaid program, known as Medi-Cal. At issue here are reductions that the Legislature enacted in 2008 and 2009 to payments made to certain types of Medicaid providers (e.g., pharmacists, Adult Day Health Centers (ADHCs), and hospitals for various types of services), and a reduction enacted in 2009 to the State's contribution to rates paid by counties to providers of In-Home Supportive Services (IHSS).

The Ninth Circuit affirmed injunctions of, or ordered enjoined, all of the enactments challenged by respondents on the ground that they are preempted by 42 U.S.C. § 1396a(a)(30)(A) (hereinafter, § 30(A)). The court recognized that § 30(A) does not confer any "rights" that may be enforced by private parties under 42 U.S.C. § 1983. The court held, nonetheless, "that 'a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created "right," in the sense that term has recently been used in suits brought under § 1983.'" *Cal. Pharm.* Pet. App. 46; *see also Indep. Living* Pet.74-75, 83-84, 92-93. The issue thus presented is whether private parties may assert a preemption claim under the Supremacy Clause to enforce a federal Spending Clause statute, § 30(A), where, *inter alia*, Congress itself has not created a private cause of action to enforce the statute;

Congress has vested enforcement of the statute in an administrative agency; the legislative history confirms congressional intent to preclude, rather than permit, private challenges; and this Court repeatedly has held that the Supremacy Clause does not create any rights.

A. Statutory and Regulatory Background

Medicaid is a cooperative federal-state program that provides federal financial assistance to participating states to reimburse providers for covered health care services rendered to Medicaid-eligible individuals. 42 U.S.C. §§ 1396 *et seq*. A state's participation in Medicaid is voluntary, but if it chooses to participate, it must comply with the Medicaid Act and implementing regulations promulgated by the Secretary of the United States Department of Health and Human Services (HHS). *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990).

To receive funds, a state must administer its Medicaid program through a state plan approved by HHS. 42 U.S.C. § 1396a. The federal statute at issue here requires that a state plan for medical assistance

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough

> providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A).

A state may modify its state plan by submitting a state plan amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) for approval. 42 C.F.R. §§ 430.12 *et seq*. Anticipating that compliance issues might arise, Congress provided for an administrative remedy should a state be found not in compliance with its plan: "after reasonable notice and opportunity for hearing," HHS may withhold or limit "further payments" to a state until it is satisfied with the state's compliance. 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Under HHS regulations, if a state's Medicaid expenditures are disallowed by HHS, the state may repay the funds through an "adjustment" to a "subsequent grant award." 42 C.F.R. §§ 430.33(c)(3), 430.42(a), (d); *see also id.* § 430.35(d). Alternatively, a state may arrange to repay disallowed funds in installments. *Id.* § 430.48. If a state disagrees with a notice of disallowance (or of disapproval of a SPA), it may request an administrative hearing. *Id.* §§ 430.60 *et seq*.

Private parties, such as Medicaid beneficiaries and providers, may participate in such hearings, either as "parties" or as "amicus curiae," depending on the nature of their interests in the matter. 42

C.F.R. § 430.76.[2] In connection with such hearings, CMS (and any party) may conduct discovery and offer evidence, including expert opinion testimony. *Id.* §§ 430.83, 430.86, 430.88. A state may appeal an adverse final determination to the United States Court of Appeals for the circuit in which the state is located. *Id.* §§ 430.38, 430.102. Private parties may appeal only if they fall within the zone of interests sought to be protected by the statutory provision at issue. *See* 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997).

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[2] Respondents (and some of the amici in the present cases) are actively participating as amici in CMS's administrative proceedings with respect to the SPAs at issue in these cases. *See, e.g.*, Joint Petition for Participation in Administrative Hearing, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Jan. 3, 2011) (submitted on behalf of, *inter alia*, California Hospital Association, California Pharmacists Association, and Independent Living Center of Southern California); AARP's Application for Leave to File *Amicus Curiae* Brief and Proposed *Amicus Curiae* Brief Urging Affirmance of CMS' Decision Disapproving Proposed California State Plan Amendments, *In re Reconsideration of Disapproval of California State Plan Amendments* (HHS Feb. 3, 2011); Letter from Mary Staples, Regional Director, State Government Affairs, National Association of Chain Drug Stores, to Benjamin Cohen, Presiding Officer, Centers for Medicare and Medicaid Services (Jan. 5, 2011). CMS has approved the petitions to file amicus briefs. *See* Email from Benjamin R. Cohen, Presiding Officer, to David Hoskins *et al.*, Re: Petitions to Participate in Hearing on Reconsideration of California State Plan Amendments (Feb. 10, 2011).

B. Facts

Respondents challenge three sets of Medicaid reforms that California enacted in February 2008, September 2008, and February 2009, as part of a comprehensive, and continuing, effort to address the State's daunting fiscal crisis in a responsible manner. Most of the reforms reduced payments to providers of various types of services by a percentage, ranging from 1% to 10% depending on the nature of the service or type of provider. *See, e.g.*, Cal. Welf. & Inst. Code §§ 14105.19(b)(1), 14166.245(b), (c)(3) (Feb. 2008); *id.*, §§ 14105.191(b)(1)-(3), 14166.245(b), (c) (Sept. 2008). One set of reforms did not reduce payments to providers, but instead reduced the State's maximum contribution to wages and benefits paid by the counties to Medicaid providers of In Home Supportive Services. *Id.*, § 12306.1(d)(6) (Feb. 2009). The methodology for determining overall payments for such services (i.e., collective bargaining between counties and unions) did not change. *Cal. Pharm.* Pet. App. 63-64, 66, 163-64.[3]

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[3] As petitioners previously advised the Court, the reductions at issue in *Independent Living*, S. Ct. No. 09-958, sunset on February 28, 2009, although that petition continues to present a live controversy because the State challenges the propriety of overpayments that it made to providers as a result of improper injunctions affirmed in the underlying appeals, and because the issues raised are recurring. *See Indep. Living* Pet. App. 44-48. Moreover, the district court has stayed *Independent Living*, including certain providers' already-filed motion seeking additional retroactive relief with respect to the statutory reductions

(Continued on following page)

C. Proceedings Below

In the seven decisions at issue in these three consolidated petitions for certiorari, the Ninth Circuit affirmed every district court order granting an

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that sunset on February 28, 2009, pending a decision from this Court on whether a Supremacy Clause claim may be maintained. *Indep. Living Ctr. of So. Cal. v. Shewry*, No. CV 08-3315 (C.D. Cal. June 17, 2010) (order granting DHCS's application for stay of trial court proceedings). In March and April 2011, the California Legislature enacted legislation that will affect some of the reductions at issue in *California Pharmacists*, S. Ct. No. 09-1158, and *Santa Rosa*, S. Ct. No. 10-283, including (1) new reductions that will replace the AB1183 reductions upon federal approval; and (2) elimination of the AB5 reductions and AB1183 CMAC-5% cap on payments to noncontract hospitals for inpatient services beginning April 13, 2011. *See* Cal. Welf. & Inst. Code §§ 14105.191, 14105.192 (as amended and enacted by Cal. Stats. 2011, ch. 3 (A.B.97), §§ 93.2, 93.5); *id.* § 14166.245(j) (as amended by Cal. Stats. 2011, ch. 19 (S.B.90), § 4). The Legislature also provided that the AB1183 reductions will become "inoperative for dates of service after June 1, 2011," *see* Cal. Welf. & Inst. Code § 14105.191(j) (as amended by Cal. Stats. 2011, ch. 3 (A.B.97), § 93.2), although DHCS anticipates trailer bill legislation to clarify that the AB1183 reductions will remain in place until new rate reductions take effect following federal approval. The *California Pharmacist* and *Santa Rosa* petitions (along with *Independent Living*) continue to present live controversies because (1) the changes are contingent on events that have not yet occurred, such as federal approval; (2) even after the changes take effect, the propriety of overpayments that the State contends it has made pursuant to injunctions entered in those cases will remain live, as it does in *Independent Living*; and (3) the issue raised herein will recur until or unless it is resolved by this Court. *See Cal. Pharm.* Pet. App. 228-42 (describing dozens of Supremacy Clause cases filed in the wake of *Independent Living I*).

injunction, and reversed the one district court order denying an injunction. *See Cal. Pharm.* Pet. 37, 106. As a consequence, every Medicaid reform challenged by private parties on appeal has now been enjoined.

The Ninth Circuit first recognized a Supremacy Clause cause of action to enforce § 30(A) in *Independent Living Center of Southern California v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) (*Independent Living I*), *see Indep. Living* Pet. App. 58, a precursor to the appeals at issue in No. 09-958 (*Independent Living II* and *III*). The court recognized that, pursuant to its prior decision in *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005), § 30(A) does not confer any "rights" on private parties that are enforceable under § 1983. *Id.* at 65-66, 92-93.[4] Consistent with *Sanchez*, the court acknowledged that respondents "do not seek to enforce any substantive 'right' conferred by statute." *Indep. Living* Pet. App. 92-93. However, it characterized DHCS's reliance on *Sanchez* as "misplaced," because "our decision in [*Sanchez v.*] *Johnson* had nothing to say about a claim for injunctive relief brought under the Supremacy Clause." *Id.* at 87. The court thus sidestepped *Sanchez* by "holding that a party may seek injunctive relief under the Supremacy

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[4] In *Sanchez*, the Ninth Circuit had held that § 30(A) cannot be enforced by Medicaid beneficiaries or providers under § 1983 because it does not confer any "rights" on any private parties and because it requires balancing of "indeterminate and competing" policy objectives that are "ill-suited" for judicial enforcement. 416 F.3d at 1059-62.

Clause regardless of whether the federal statute at issue confers any substantive rights on would-be plaintiffs." *Indep. Living* Pet. App. 83; *see also id.* at 84 (holding "the 'rights' requirement inapplicable to ILC's claims in this case"). In support, the Ninth Circuit noted that this Court "has repeatedly entertained claims for injunctive relief based on federal preemption, without requiring that the standards for bringing suit under § 1983 be met." *Id.* at 68; *see also id.* at 68-83 (citing, *inter alia*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003)). DHCS filed a petition for certiorari seeking review of this decision, which the Court denied on June 22, 2009 (S. Ct. No. 08-1223).

The petition in *Independent Living* (S. Ct. No. 09-958) concerns appeals from the district court's decisions on remand of *Independent Living I*. On August 18, 2008 and November 17, 2008, the district court entered two orders enjoining DHCS from implementing payment reductions as to, *inter alia*, pharmacists, physicians, dentists, ADHCs, and providers of non-emergency transportation services and home health services. *Indep. Living* Pet. App. 94, 133. On August 27, 2008, the district court amended its August 18, 2008 injunction to provide only prospective relief. *Id.* at 125-26.

On appeal, the Ninth Circuit affirmed both district court injunctions. *Indep. Living* Pet. App. 1, 54 (*Independent Living II* and *III*). The court acknowledged that § 30(A) "does not create any

federal 'rights' enforceable under § 1983." *Indep. Living* Pet. App. 13, n.10 & 15-16 (citing *Sanchez*). But the court denied as "moot" DHCS's effort to reargue whether private parties may sue to enforce § 30(A) under the Supremacy Clause, citing its decision in *Independent Living I*. *Id.* at 8 n.7. The court also reversed the district court's August 27, 2008 order, and held that providers in *Independent Living II* were entitled to retroactive damages from the date that the reductions at issue in that case took effect (i.e., July 1, 2008) until the injunctions were entered. *Id.* at 29-37; *see also id.* at 46-47.

In the *California Pharmacists* appeals (No. 09-1158), the Ninth Circuit applied and expanded on its theory. DHCS had opposed the injunctions in those cases contending, *inter alia*, that providers' economic injury is not a harm that § 30(A) was designed to protect against. In rejecting this argument, the Ninth Circuit reiterated "that 'a plaintiff seeking injunctive relief under the Supremacy Clause on the basis of federal preemption need not assert a federally created "right," in the sense that term has recently been used in suits brought under § 1983, but need only satisfy traditional standing requirements.'" *Cal. Pharm.* Pet. App. 46. The court then elaborated: "A cause of action based on the Supremacy Clause obviates the need for reliance on third-party rights because the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is

not rights based." *Id.* at 47; *see also id.* at 32-33, 38-39.[5] Instead, "private parties [may] enforce the structural relationship between the federal and state governments . . . as, essentially, private enforcers of the Supremacy Clause; the specific relationship of those parties to the federal statute on which the Supremacy Clause cause of action is premised does not matter." *Id.* at 48.

SUMMARY OF ARGUMENT

Congress must create any private cause of action to enforce a federal statute. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280, 283 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The Ninth Circuit and respondents acknowledge that Congress has not created a private cause of action to enforce § 30(A). Nonetheless, the Ninth Circuit held in these cases that the Supremacy Clause creates a private cause of action to enforce § 30(A) against a state, and that "rights" and congressional intent are irrelevant to whether such a cause of action exists. The Ninth Circuit is wrong: the Supremacy Clause cannot, by itself, create a cause of action, and any cause of action to enforce a federal statute must come from Congress. Were it to stand, the Ninth Circuit's analysis would

[5] The remaining Ninth Circuit decisions at issue in S. Ct. Nos. 09-1158 and 10-283 applied *Independent Living I* without further analysis. Except for the unpublished decision in *Santa Rosa*, all of the decisions were issued by the same panel that decided *Independent Living I*.

fundamentally alter the traditional separation of powers among the branches and transform the courts into all-purpose regulatory enforcers of Spending Clause enactments.

I.a. Congress's exclusive prerogative to determine who may enforce federal statutes, and how, is well-settled. *Sandoval*, 532 U.S. 275; *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011); *Gonzaga*, 536 U.S. at 280. Where (as here) Congress has not expressly created a private cause of action to enforce a federal statute, this Court has required private parties to demonstrate, *inter alia*, that Congress created an individualized "right" in favor of plaintiffs, and that Congress intended to provide a private remedy. *Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also Gonzaga*, 536 U.S. at 282. These principles are grounded in separation of powers, and prevent the judiciary from becoming embroiled in disputes that Congress has not assigned to it. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008).

b. Under a straightforward application of this Court's precedent, § 30(A) may not be enforced by private parties. Section 30(A) does not contain an express cause of action, nor does it satisfy the requirements for private enforcement under § 1983 or *Cort v. Ash*, as respondents concede. *See Gonzaga*, 536 U.S. at 280-86, 290; *Cort*, 422 U.S. at 78. Although the Ninth Circuit recognized that § 30(A) does not confer any privately enforceable rights, that court held that private parties can enforce it anyway, under

the Supremacy Clause. The Ninth Circuit did not grapple with *Gonzaga*, but simply dismissed such precedent as irrelevant. *See Cal. Pharm.* Pet. App. 48; *see also Indep. Living* Pet. App. 87. Because Congress did not create a cause of action to enforce § 30(A), an essential fact that no one disputes, the present cases should be dismissed under a straightforward application of *Gonzaga* and *Cort*.

c. Implying a cause of action to enforce § 30(A) would frustrate, rather than further, congressional intent, in numerous respects. Contrary to congressional intent, private suits have driven up Medicaid costs in California and elsewhere; undermined the national uniformity of federal Medicaid requirements; and resulted in an unworkable regulation-by-injunction system in which the States cannot predict their Medicaid costs with accuracy and are subjected to massive unfunded liabilities when they guess incorrectly what a court might do. Moreover, private lawsuits interfere with the administrative enforcement mechanism that Congress created to ensure the States' compliance with the Medicaid Act. The injunctions issued in the present cases, for example, have prejudiced California in the administrative proceedings pending as to the reductions at issue, because they have caused CMS to become concerned about retroactive liability that providers might face if it approves the SPAs. *See* Brief for the United States as Amicus Curiae, App. 3a, *Independent Living*, S. Ct. No. 09-958 (filed Dec. 3, 2010). The legislative history does not contain any hint that Congress intended for

private parties to enforce § 30(A). To the contrary, in 1997 Congress repealed a different Medicaid provision (the Boren Amendment) in an effort to preclude exactly the type of challenge to Medicaid ratemaking that private parties are now seeking to assert under § 30(A).

II. Respondents cannot obtain a different result by recasting their claims to sound in preemption. Whether characterized as § 1983 claims or preemption claims, respondents' efforts to enforce § 30(A) "are in substance one and the same," and "[t]heir treatment, therefore, must be the same, '[n]o matter the clothing in which [private parties] dress their claims.'" *Astra*, 131 S. Ct. at 1345 (quoting *Tenet v. Doe*, 544 U.S. 1, 8 (2005)). Private parties should not be able to use the Supremacy Clause to effectuate an end run around *Gonzaga*, *Cort*, *Sandoval*, and congressional intent.

a. The Supremacy Clause cannot supply a cause of action to enforce a federal statute because the Clause does not confer any substantive "rights." *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Rather, the history of its adoption, its placement in Article VI, and this Court's precedent all confirm a different role for the Clause: it supplies a rule of decision – that federal law trumps conflicting state law – in cases that are properly before a court. Without a declaration of supremacy, the Framers were concerned that

state court judges might continue to apply a then existing rule of construction that, among "equal" sovereigns, a later enactment trumps an earlier enactment. *The Federalist* No. 78, at 394-95 (I. Shapiro ed., 2009) (Alexander Hamilton); James Madison, Vices of the Political System of the United States (1787), *in* 2 *The Writings of James Madison* 364-65 (G. Hunt ed., 1901). Thus, to the Framers' thinking, the Supremacy Clause merely confirmed a self-evident truth (the supremacy of federal law) that flows from the nature of a national government. *The Federalist* No. 33, at 159, 161 (Alexander Hamilton).

b. Moreover, the Supremacy Clause and preemption have no role in a dispute over a state's compliance with a funding condition set forth in a Spending Clause statute. The relationship between the federal and state governments in this context is defined *not* by the supremacy of federal law, but by the quasi-contractual agreement between the governments. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). After all, through the Spending Clause, Congress may entice states to voluntarily accept obligations that it could not directly mandate. *N.Y. v. United States*, 505 U.S. 144, 166-67 (1992). If a state fails to comply with a federal condition for receiving federal funding under the Medicaid Act, the state is not in "conflict" with federal law, as Congress expressly anticipated that such noncompliance could occur, and provided the remedy (i.e., loss of federal funding). 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35.

These features set the present case apart from a "classic" preemption case, where a state seeks to exercise regulatory power in an area that Congress has taken exclusively for itself. Such true "conflicts" between state and federal law typically arise in cases concerning interstate commerce, international commerce, and foreign relations – those aspects of the national Union that the Framers sought to protect following unsatisfactory experiences under the Articles of Confederation. But a state's failure to satisfy a federal funding condition, as to a voluntary program in which it is not required to participate, does not frustrate the national purposes for which the Union was formed.

c. Finally, several different strands of prudential standing bar any claims that respondents may have. Because any right to hold the State to its Medicaid obligations under § 30(A) belongs to the federal government exclusively, respondents cannot satisfy the requirement that their lawsuits seek to vindicate rights personal *to them*. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). In addition, respondents do not "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 475 (1982). And lastly, the notion that providers may sue as "private enforcers" of "the proper constitutional structural relationship between the state and federal governments," *see Cal. Pharm.* Pet. App. 33, 39, 47-48, notwithstanding their lack of

any injury cognizable under § 30(A), cannot be reconciled with this Court's repeated rejection of such "generalized grievances" as a basis for private suits. *See Valley Forge*, 454 U.S. at 483-84.

ARGUMENT

I. PRIVATE PARTIES CANNOT ENFORCE § 30(A) BECAUSE CONGRESS HAS NOT CREATED A PRIVATE CAUSE OF ACTION TO ENFORCE THIS FEDERAL STATUTE

Respondents, who are private parties, seek to enforce a federal statute, § 30(A). Respondents concede, however, that Congress has not created a private cause of action to enforce § 30(A). Moreover, implying a private cause of action to enforce § 30(A) would conflict with congressional intent. Because respondents do not have a cause of action to enforce § 30(A), the Ninth Circuit's decisions in these cases should be reversed, and respondents' cases must be dismissed.

A. Only Congress Can Create a Private Cause of Action to Enforce a Federal Statute

As the entity that enacts federal statutes, Congress alone has the power to determine who may enforce them. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532

U.S. 275, 286 (2001); *see also Astra USA, Inc. v. Santa Clara County*, 131 S. Ct. 1342, 1347 (2011); *Horne v. Flores*, 129 S. Ct. 2579, 2598 n.6 (2009). Particularly when Spending Clause provisions are involved, clear evidence of congressional intent to create a private right of action is required: "[U]nless Congress 'speak[s] with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)). In these respects, private enforcement of federal statutes differs from private enforcement of *constitutional* obligations: "[T]he judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Davis v. Passman*, 442 U.S. 228, 241 (1979).

The principle that Congress alone determines who may enforce federal statutes is grounded in separation of powers. "In the absence of congressional intent the Judiciary's recognition of an implied private right of action 'necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve.'" *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008) (quoting *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (1951)). This Court has repeatedly reaffirmed this principle. *See, e.g., Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) ("Congress rather than the courts controls the availability of remedies for violations of statutes.");

Passman, 442 U.S. at 241 ("Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner.").

To ensure that private lawsuits to enforce federal statutes only proceed consistent with congressional intent, this Court has developed two separate tests that apply when (as here) Congress does not make its intentions express. Both tests require a congressionally-created, individualized "right" in favor of the plaintiff. First, a private cause of action may be implied from a federal statute if a plaintiff can demonstrate, *inter alia*, that the statute "create[s] a federal right in favor of the plaintiff"; there is "legislative intent . . . to create [but not] . . . deny" a private remedy; and implying a private remedy would be consistent with the "underlying purposes of the legislative scheme." *Cort v. Ash*, 422 U.S. 66, 78 (1975). Alternatively, a private cause of action may proceed under 42 U.S.C. § 1983 if a plaintiff can show that Congress has conferred an individual right on a private party; the right is not so "'vague and amorphous' that its enforcement would strain judicial competence"; and the provision is "'couched in mandatory, rather than precatory, terms.'" *Gonzaga*, 536 U.S. at 282. These tests ensure that private enforcement proceeds only as Congress intended, and avoid embroiling the judiciary in controversies that Congress has not assigned to it. *See Wilder*, 496 U.S. at 508 n.9 ("The [*Cort*] test reflects a concern, grounded

in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."). In addition, these tests help ensure that federal courts do not become obliged to adjudicate issues for which judicial enforcement is not necessary or appropriate.

B. Section 30(A) Does Not Create a Private Cause of Action

It is undisputed that Congress did not confer any private rights when it enacted § 30(A), and therefore that Congress itself has not created a private cause of action to enforce this federal statute. The Ninth Circuit, itself, has held that § 30(A) does not contain any rights-creating language, and that the statute's text and structure reflect congressional intent that it be enforced administratively. *Sanchez v. Johnson,* 416 F.3d 1051, 1059-62 (9th Cir. 2005). In *Sanchez*, the Ninth Circuit explained that § 30(A) does not meet the criteria for private enforcement because, *inter alia*, the statute confers no "rights" on providers or beneficiaries, and is "ill-suited" for judicial enforcement because it incorporates "nebulous," "indeterminate[,] and competing" policy goals. *Id.* at 1059-60 ("The tension between these statutory objectives supports the conclusion that § 30(A) is concerned with overall methodology rather than conferring

individually enforceable rights on individual Medicaid recipients.").[6]

In the present cases, the Ninth Circuit did not purport to overrule *Sanchez*, but simply held that it is "inapposite" because respondents are suing under the Supremacy Clause instead of under § 1983. *Cal. Pharm.* Pet. App. 48; *see also Indep. Living* Pet. App. 87 ("[O]ur decision in [*Sanchez v.*] *Johnson* had nothing to say about a claim for injunctive relief brought under the Supremacy Clause."). The Ninth Circuit acknowledged that respondents are not seeking to enforce any statutory right, but held that rights are irrelevant in a Supremacy Clause cause of action. *Indep. Living Pet.* at 13 ("In this case . . . Independent Living does not seek direct enforcement

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[6] Virtually every other circuit to consider this issue since *Gonzaga* has reached the same conclusion. *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 57-58 (1st Cir. 2004); *N.Y. Ass'n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 147 (2d Cir. 2006) (per curiam); *Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697, 703-04 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 34 (2008); *Westside Mothers v. Olszewski*, 454 F.3d 532, 542 (6th Cir. 2006); *Mandy R. ex rel. Mr. & Mrs. R. v. Owens*, 464 F.3d 1139, 1146-48 (10th Cir. 2006), *cert. denied*, 549 U.S. 1305 (2007); *see also Pa. Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 541-42 (3d Cir. 2002) (Alito, J.). The Eighth Circuit alone has reached a contrary result, although its decision recently was called into question. *Compare Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs.*, 443 F.3d 1005, 1013-16 (8th Cir. 2006), *cert. granted, judgment vacated in part*, 551 U.S. 1142 (2007) (mem.) *with Minn. Pharmacists Ass'n v. Pawlenty*, No. 09-2723, 2010 U.S. Dist. LEXIS 11620 (D. Minn. Feb. 10, 2010).

of any 'rights' created by § 30(A)."); *Cal. Pharm.* Pet. at 32-33, 38-39, 46-48; *see also Indep. Living* Pet. at 87 (discussing *Sanchez*); *id.* at 92-93 ("They do not seek to enforce any substantive 'right' conferred by statute.").

Respondents have irrevocably conceded that § 30(A) does not confer any individual rights. Not a single respondent, in the seven appeals now consolidated before this Court, argued below that *Sanchez* was wrongly decided. To the very limited extent that they acknowledged *Sanchez* in their briefs, respondents dismissed it as "inapplicable and irrelevant." *See, e.g.*, Appellee's Answering Brief 10, No. 08-56422, Docket Entry No. 31 (9th Cir. Nov. 13, 2008) ("Hence the *Sanchez* rules which *are applicable only to § 1983 claims*, are inapplicable and irrelevant in the Supremacy Clause case at bar.").[7]

Because only Congress may create a right of action to enforce § 30(A), and because Congress did not do so here as respondents concede, respondents lack a cause of action. Congress has not spoken with a "clear voice" and manifested an "'unambiguous'

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[7] *See also* 9th Cir. No. 08-56422, Docket Entry No. 28, at 13-14; 9th Cir. No. 08-56422, Docket Entry No. 98, at 9-10; 9th Cir. No. 08-57016, Docket Entry No. 13, at 21-23; 9th Cir. No. 09-55532, Docket Entry No. 16, at 7; 9th Cir. No. 09-55532, Docket Entry No. 20, at 28 n.6; 9th Cir. No. 09-55365, Docket Entry No. 49, at 14-15; 9th Cir. No. 09-16359, Docket Entry No. 9, at 23 n.28 & 35-36; 9th Cir. No. 09-16359, Docket Entry No. 38, at 43-45; 9th Cir. No. 09-17633, Docket Entry No. 13, at 46.

intent to confer individual rights" under § 30(A), as required by *Gonzaga*, *Sandoval*, and *Cort*.

C. Implying a Cause of Action Would Contravene Congressional Intent

Not only would implying a cause of action contravene multiple lines of this Court's decisions requiring creation of a "right" before a private cause of action may proceed, to imply a cause of action here would frustrate specific congressional intent regarding the Medicaid Act. Congressional intent is paramount in a preemption context, no less than in any other context involving enforcement of federal statutes. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009) ("'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'"). Congress's purposes include preserving and enhancing the States' flexibility to control and reduce costs and increase the efficiency of Medicaid; centralizing enforcement authority in HHS; and protecting the States from private lawsuits that drive up the cost of Medicaid. These purposes are reflected in the text and structure of § 30(A) and in the legislative history – purposes that are directly undermined by the Ninth Circuit's holdings here.

1. Implying a private cause of action to enforce § 30(A) is inconsistent with the statutory framework and, in particular, Congress's decision to centralize enforcement authority in HHS. *See Long Term Care Pharmacy Alliance*, 362 F.3d at 58; *Sanchez*, 416 F.3d

at 1059-61; *see also Astra*, 131 S. Ct. at 1349 (holding that private enforcement of obligations owed by pharmaceutical companies to the federal government under Medicaid's 340B program would undermine Congress's intent for centralized enforcement). Private suits undermine the key benefits of a centralized administrative enforcement scheme: national uniformity, consistency, and predictability in interpretation and administration of federal law. Indeed, states in the Ninth Circuit are now subject to onerous, judicially created requirements that apply nowhere else in the country.[8] This is the antithesis of how the system is supposed to work. *Gonzaga*, 536 U.S. at 292 (Breyer, J., concurring) (contrasting "the expertise, uniformity, wide-spread consultation, and resulting administrative guidance that can accompany agency decisionmaking" with the "comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action for damages").

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[8] For example, the Ninth Circuit alone requires states to consider providers' costs in ratemaking, and to conduct a certain kind of pre-enactment "study" before reducing rates. *Compare Indep. Living* Pet. App. 10-12, 19-20, 55-56; *Cal. Pharm.* Pet. App. 3, 11-17, 36 *with Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851-53 (3d Cir. 1999); *Minn. HomeCare Ass'n v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997) (per curiam); *Methodist Hosps., Inc. v. Sullivan*, 91 F.3d 1026, 1030 (7th Cir. 1996); *see also Pa. Pharmacists*, 283 F.3d at 538; *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 933 n.33 (5th Cir. 2000), *overruled in part on other grounds, Equal Access for El Paso*, 509 F.3d at 704.

In addition, regulation by litigation makes it virtually impossible for states to plan and budget their Medicaid obligations. As the system is supposed to work, the States communicate regularly with CMS, even obtaining guidance memoranda as issues arise. Such communication reduces the likelihood that a state will guess incorrectly how CMS will interpret a Medicaid obligation and face substantial unplanned liabilities as a result. Litigation is far more unpredictable: California's failure to correctly predict how the Ninth Circuit would interpret § 30(A) has already cost its Medicaid program well over $1 billion in unanticipated expenses – exactly the result that the Court has explained should be avoided. *Pennhurst*, 451 U.S. at 16 ("[W]e may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."); *see also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (cautioning against "government by injunction").

Private lawsuits also interfere with, and disrupt, CMS's own enforcement procedures. Again, this is vividly demonstrated in the present cases, where the injunctions have *materially altered and prejudiced* California's ability to obtain CMS approval of its still-pending SPAs. As this Court is already aware, in November 2010, CMS denied *all* of California's pending SPAs citing, *inter alia*, concern about the destabilizing effect on access to services if providers were required to repay funds issued pursuant to the pending injunctions. *See* Brief for the United States as

Amicus Curiae, App. 3a, *Independent Living*, S. Ct. No. 09-958 (filed Dec. 3, 2010) ("Additionally, CMS is concerned that, given the time that has elapsed since these SPAs were submitted, the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate access concerns."). These are issues that should be worked out between CMS and the States in the administrative process created by Congress, with participation by providers and beneficiaries in that process *as contemplated by HHS regulations*, and without the confounding impact of court injunctions. 42 C.F.R. §§ 430.76, 430.83, 430.86, 430.88.

2. The legislative history confirms that permitting private enforcement of § 30(A) would frustrate Congress's purposes. In enacting and amending § 30(A), Congress has repeatedly underscored that states must have substantial flexibility to innovate and run their Medicaid programs cost-effectively. Lawsuits are antithetical to that flexibility, as Congress made clear when it repealed a different provision (the Boren Amendment) that previously had been interpreted by the courts as a vehicle for bringing precisely the type of private challenges to Medicaid rates at issue here.

Section 30(A) was adopted in 1967 as a cost-saving measure, and required the States to include in their state plans methods and procedures to "safeguard against unnecessary utilization" of Medicaid services and to assure that payments to providers were not "in excess of reasonable charges consistent

with efficiency, economy, and quality of care." Social Security Amendments of 1967, Pub. L. No. 90-248, § 237(b), 81 Stat. 821, 911 (1968). In 1981, Congress deleted the "reasonable charges" requirement from § 30(A) in response to complaints that it hampered the States' abilities to innovate cost-effective approaches to provider reimbursement. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2174, 95 Stat. 357, 809 (1981); H.R. Rep. No. 97-158, Pt. 2, at 312-33 (1981). Congress hoped that this and other amendments would "reduce Federal outlays in Medicaid . . . in a manner which . . . provides the States with flexibility to institute a number of measures in their programs to reduce cost and make them more efficient." H.R. Rep. No. 97-158, Pt. 2, at 279.[9] There is no suggestion in the legislative history of § 30(A) that Congress intended for private parties to enforce § 30(A), although there are numerous references to enforcement by HHS. *See, e.g.*, S. Rep. No. 90-744, at 28, 160 (1967), *reprinted in* 1967

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[9] Additional amendments to § 30(A) were made in 1972 and 1989. *See also* Social Security Amendments of 1972, Pub. L. No. 92-603, § 237(a)(2), 86 Stat. 1329, 1416 (1972) (requiring use of "utilization review plans" for some providers); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6402(a), 103 Stat. 2106, 2260 (1989) (adding objective that payments be "sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area," as part of series of amendments intended to reduce infant mortality); H.R. Rep. No. 101-247, at 389-90 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 2115-16.

U.S.C.C.A.N. 2834, 2867, 3023; H.R. Rep. No. 101-247, at 390-91, *reprinted in* 1989 U.S.C.C.A.N. at 2116-17.

Congress's belief that private suits challenging the adequacy of Medicaid payments are antithetical to state flexibility is demonstrated by its repeal of the Boren Amendment following *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). The Boren Amendment required states to "find[] and make assurances satisfactory to the Secretary" that the Medicaid rates paid for skilled nursing facility and intermediate care facility services "are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities" to provide care in compliance with applicable state and federal law requirements. Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 962(a), 94 Stat. 2599 (1980). In *Wilder*, the Court held that the Boren Amendment conferred a "right" on providers, enforceable under § 1983, to "reimbursement rates that are reasonable and adequate to meet the costs of an efficiently and economically operated facility." 496 U.S. at 510. *Wilder* sparked a nationwide explosion of provider lawsuits challenging the adequacy of state Medicaid rates.[10]

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[10] *See, e.g.*, *Pinnacle Nursing Home v. Axelrod*, 928 F.2d 1306 (2d Cir. 1991); *Erie County Geriatric Ctr. v. Sullivan*, 952 F.2d 71 (3d Cir. 1991); *Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991); *Abbeville General Hosp. v. Ramsey*, 3 F.3d 797 (5th Cir. 1993); *Ill. Health Care Ass'n v. Bradley*, 983 F.2d 1460 (7th

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Congress responded by repealing the Boren Amendment in 1997. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4711, 111 Stat. 251, 507-08 (1997). In so doing, Congress repeatedly expressed its intent to eliminate private lawsuits in order to give the States more flexibility in setting Medicaid rates and to reduce Medicaid costs. A House committee report stated:

> A number of Federal courts have ruled that State systems failed to meet the test of "reasonableness" and some States have had to increase payments to these providers as a result of these judicial interpretations.[¶]. . . . It is the Committee's intention that, following enactment of this Act, *neither this nor any other provision of Section 1902* [of the Social Security Act, i.e., 42 U.S.C. § 1396a] will be interpreted as establishing a cause of action for hospitals and nursing facilities *relative to the adequacy of the rates they receive.*

H.R. Rep. No. 105-149, at 590-91 (1997) (emphasis added); *see also* 143 Cong. Rec. S6301-02, S6305 (1997) (statement of Sen. Domenici) ("Provide flexibility *instead of the rigidity brought on by lawsuits*. The Boren amendment should be dead." (emphasis added)). The Congressional Budget Office had estimated that Boren's repeal would reduce Medicaid spending

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Cir. 1993); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536 (10th Cir. 1994).

by about $1.2 billion from 1998 to 2002 – an estimate that "assumes that reimbursement rates for institutional providers would increase more slowly than if providers could *continue to use the threat of Boren suits as leverage against the states*." H.R. Rep. No. 105-149, at 625 (1997) (emphasis added).[11]

In short, by its repeal of Boren, Congress made clear that private lawsuits challenging the adequacy of rates impose an unacceptable burden on state flexibility. To paraphrase Senator Domenici, these types of lawsuits "should be dead." *See* 143 Cong. Rec. at S6305. The Ninth Circuit's effort to revive them must be rejected.

II. THE SUPREMACY CLAUSE DOES NOT PROVIDE A MECHANISM FOR CIRCUMVENTING *GONZAGA*, *SANDOVAL*, AND *CORT*

Respondents' position may be summarized succinctly: "[t]he claim that only Congress can create a right to sue to protect oneself against injury from

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[11] *See also* 143 Cong. Rec. at S6305 (statement of Sen. Gramm) ("The Boren amendment has produced endless lawsuits. States want to negotiate with hospitals and get the best rate they can. Repealing the Boren amendment takes it out of the courts."); 143 Cong. Rec. S6058-04, S6068 (1997) (statement of Sen. Roth) (repeal of Boren Amendment "will take the providers and the States out of the Federal courts and put them back at the contract negotiating table"); 142 Cong. Rec. S5305-05, S5355 (1996) (statement of Sen. Chafee) (repeal "will allow States to establish their own reimbursement rates and free them from much of the litigation that now exists").

preempted state action, is hookum [sic] and bunkum." Appellee's Answering Brief 9, No. 08-56422, Docket Entry No. 31 (9th Cir. Nov. 13, 2008). According to respondents, the Constitution *always* creates a cause of action to enforce a federal statute when it allegedly conflicts with state law, and "Congressional intent is not relevant" as to whether such a cause of action exists. Brief in Opposition 13, *Maxwell-Jolly v. Santa Rosa Memorial Hospital*, No. 10-283 (filed Oct. 27, 2010). Respondents squarely reject, therefore, the proposition that Congress alone determines who may enforce federal statutes; and they reject the proposition that congressional intent is even relevant, much less *dispositive*, on whether statutes may be privately enforced.

Respondents are wrong. As this Court recently explained in *Astra*, another case involving private parties' efforts to enforce Medicaid obligations owed to the federal government in the absence of a right to sue: "[t]he absence of a private right to enforce the statutory . . . obligations would be rendered meaningless if [private parties] could overcome that obstacle by" simply recasting the theory under which their claims are brought. *Astra*, 131 S. Ct. at 1348. Respondents' suits to enforce § 30(A), whether characterized as § 1983 claims or preemption claims, "are in substance one and the same" and "[t]heir treatment, therefore, must be the same, '[n]o matter the clothing in which [private parties] dress their claims.'" *Id.* at 1345 (quoting *Tenet v. Doe*, 544 U.S. 1, 8 (2005)). The Court should reject respondents' invocation of the

Supremacy Clause to effectuate an end run around *Gonzaga* and *Cort*.

A. The Supremacy Clause Provides a Rule of Decision Rather than a Cause of Action

1. The Supremacy Clause cannot, on its own, supply respondents with a cause of action. This Court has repeatedly held that the Supremacy Clause is not a "source of any federal rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 & n.29 (1979); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991). Thus, the Court has contrasted the Supremacy Clause, which is "'not a source of any federal rights,'" with the Commerce Clause, which "of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations." *Dennis*, 498 U.S. at 450. And the Court repeatedly has rejected use of the Supremacy Clause to constitutionalize claims that are fundamentally statutory. *Golden State*, 493 U.S. at 107; *Chapman*, 441 U.S. at 615; *Swift & Co. v. Wickham*, 382 U.S. 111, 126 (1965) (Supremacy Clause was not a "substantive provision of the Constitution" requiring a three-judge court, under a statute requiring such a panel to restrain enforcement of a state statute "upon the ground of the unconstitutionality of such statute"). Of course, that is exactly what respondents are seeking to do in the present case: to constitutionalize,

via the Supremacy Clause, a claim that a state allegedly is not complying with § 30(A).

Instead, the Supremacy Clause operates to supply a rule of decision for parties who are properly before the court. *Chapman*, 441 U.S. at 613 (while the Supremacy Clause "is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law"); *Swift*, 382 U.S. at 120 ("[I]f a state measure conflicts with a federal requirement, the state provision must give way."); *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1234 (2009) (McConnell, J., dissenting) ("The Supremacy Clause is not an independent source of rights but a rule of priority that determines who wins when state and federal law conflict."), *on reh'g en banc*, 632 F.3d 1162 (10th Cir. 2011); *see also* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2088 (2000) ("[T]he Supremacy Clause . . . prescribed a constitutional choice of law rule, one that gives federal law precedence over conflicting law."); Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 250 (2000) (similar).

2. This understanding of the Supremacy Clause follows from the circumstances of its adoption. Under the Framers' conception, the Supremacy Clause was not intended to confer any substantive rights or powers on Congress, private parties, or anyone else. Rather, it was adopted to eliminate an ambiguity that persisted, under the Articles of Confederation and then contemporary choice-of-law rules, regarding

what law courts should apply when faced with a conflict between state and federal law.

The Supremacy Clause, like the Constitution as a whole, emerged from dissatisfaction with the Articles of Confederation, and particularly the new government's inability to bind the States in matters affecting interstate commerce, domestic security, and foreign relations. Perceived weaknesses under the Articles included lack of state compliance with the Treaty of the Peace in the aftermath of the Revolution; conflicts between states with respect to navigable waters; and other forms of commercial protectionism from which "the national dignity, interest, and revenue, [have] suffered." James Madison, Vices of the Political System of the United States (1787), *in* 2 *The Writings of James Madison* 362-63 (G. Hunt ed., 1901); *see also The Federalist* No. 22, at 107-08, 113 (I. Shapiro ed., 2009) (Alexander Hamilton); *The Federalist* No. 42, at 216 (James Madison); Records of the Federal Convention, *in* 4 *The Founders' Constitution* 593 (Kurland ed., 1987) (statement of Mr. Wilson); *see generally* Christopher R. Drahozal, *The Supremacy Clause* 4-11 (2004).

One concern was whether state judges would apply federal or state law when they were in conflict, given the traditional presumption of implied repeals:

> Whenever a law of a State happens to be repugnant to an act of Congress, particularly when the latter . . . is of posterior date to the former, . . . it will be at least questionable whether the latter . . . must not prevail; and

> as the question must be decided by the Tribunals of the State, they will be most likely to lean on the side of the State.

Madison, Vices of the Political System of the United States, *supra*, at 364-65; *see also The Federalist* No. 78, at 394 (Alexander Hamilton) (duty of judges faced with conflicting laws to harmonize them or, if that is not possible, "the last in order of time shall be preferred").

To address this last question, the delegates to the Constitutional Convention considered several options, including: "1. a Veto on the passage of the State laws. 2. a Congressional repeal of them, 3. a Judicial annulment of them." Letter from James Madison to N. P. Trist (Dec. 1831), *in* 3 *The Records of the Federal Convention of 1787*, at 516 (Farrand ed., 1937). James Madison and Charles Pinkney, among others, proposed to give Congress the "power of negativing" conflicting state laws after they were enacted. *See* Records of the Federal Convention, *in* 4 *The Founders' Constitution*, *supra*, at 592-96. Opponents of the "negativing" power were concerned about its potential for abuse, or thought it "unnecessary, as the Courts of the State would not consider as valid any law contravening the Authority of the Union, and which the legislature would wish to be negatived." *Id.* at 593-95. Proponents did not want to depend on the "firmness of Judges," and therefore believed that "[i]t will be better to prevent the passage of an improper law, than to declare it void when passed." *Id.* at 596 (statement of Mr. Wilson). Nonetheless, the delegates ultimately rejected conferring a "negativing" power on Congress in favor of the declaration of "supremacy"

now found in Article VI. *Id.* at 596; *see also The Federalist* No. 80, at 401 (Alexander Hamilton); *see generally* Drahozal, *supra*, 12-25.

The Framers understood that a declaration of Supremacy would change the normal rules of construction. Alexander Hamilton explained that, where statutes conflict of "an EQUAL authority," the later-in-time will prevail under existing rules of construction applied by the courts. *The Federalist* No. 78, at 394 (Alexander Hamilton). However, a "prior act of the superior [authority] ought to be preferred to the subsequent act of an inferior and subordinate authority." *Id.* at 394-95. "[A]ccordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." *Id.* at 395; *see also The Federalist* No. 80, at 401 (Alexander Hamilton) (Convention rejected the "direct negative on State laws" in favor of "an authority of the federal courts to overrule such as might be in manifest contravention of the articles of Union").

During the debates preceding ratification, the Framers took pains to explain that this was *all* that the Supremacy Clause would accomplish. "[I]t may be affirmed with perfect confidence that the constitutional operation of the intended government *would be precisely the same*, if [the Necessary and Proper Clause and the Supremacy Clause] were entirely obliterated. . . . They are *only declaratory of a truth* which would have resulted by necessary and unavoidable implication from the very act of constituting

a federal government, and vesting it with certain specified powers." *The Federalist* No. 33, at 159 (Alexander Hamilton) (emphasis added); *see also id.* at 161 ("[T]he clause which declares the supremacy of the laws of the Union . . . only declares a truth, which flows immediately and necessarily from the institution of a federal government."). Writing after the fact, Joseph Story explained that the Supremacy Clause, and particularly its concluding words ("any thing in the constitution or laws of any state to the contrary notwithstanding"), were "introduced from abundant caution, to make its obligation more strongly felt by the state judges." 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1833, at 697 (Fred B. Rothman & Co. 1991) (1833); *see also id.*, § 1836, at 701 ("From this supremacy of the constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by congress or by a state legislature void.").

The placement of the Supremacy Clause in Article VI (rather than in Article I, section 8) of the Constitution confirms the proper understanding of the Clause as a choice-of-law provision rather than a substantive source of rights. "On its face, the Supremacy Clause only prescribed a constitutional choice of law rule, one that gives federal law precedence over conflicting law. If the Clause were meant to be an affirmative grant of Congressional power, it would likely reside in the metropolis of Congressional

power, Article I, Section 8 . . . rather than in the suburbs of Article VI." Dinh, *supra*, at 2088.

3. *Ex parte Young*, 209 U.S. 123 (1908), did not change this understanding of the Supremacy Clause. This Court did not purport to create, in *Ex parte Young*, a new, standalone, private cause of action to enforce federal statutes, but only described an "exception" to the States' immunity under the Eleventh Amendment where a party sues a state official to enjoin a state enforcement action. *See Va. Office for Protection & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011). An exception to immunity is the nonexistence of a defense, not a cause of action. Moreover, "[t]he Court wields *Young* in the name of the Supremacy Clause only to vindicate important federal rights." *Va. Office for Protection & Advocacy*, 131 S. Ct. at 1644 (Kennedy, J., concurring); *accord*, *id.* at 1638 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984)). Here, there is no federal right to vindicate.

4. Confronted with a correct reading of the Supremacy Clause, respondents note that this Court often has issued preemption decisions without first analyzing whether any congressionally conferred right existed. The lack of discussion of "rights" in the case law does not mean that such "rights" did not exist, but may simply be a vestige of an "*ancien régime*," in which "rights" were not analyzed with the rigor with which they are today. *See Sandoval*, 532 U.S. at 287; *Gonzaga*, 536 U.S. at 283. Where the rights issue *has* been raised, so far as petitioners can

determine, this Court has never held that a private cause of action exists to enforce a federal statute that all parties concede does not satisfy the requirements for private enforcement set forth in *Gonzaga* and *Cort*.

This Court's preemption cases generally fall into two, somewhat overlapping, categories, both of which are consistent with *Sandoval* and *Gonzaga*, and neither of which involves the type of rights-less, standalone cause of action at issue here. The first category consists of preemption cases in which the Court expressly found, or assumed, the existence of an individually enforceable federal right. *See, e.g.*, *Golden State Transit*, 493 U.S. at 109 (holding that preempting federal statute, "the NLRA[,] gives . . . rights enforceable against governmental interference"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from *interfering with federal rights*." (emphasis added)); *Gibbons v. Ogden*, 9 Wheat. 1, 210 (1824) (under the Supremacy Clause, courts determine "validity" of state law that "come[s] into collision with an act of Congress, and deprive[s] a citizen *of a right* to which that act entitles him" (emphasis added)). In addition, in some cases, although individual rights were not expressly identified as such, they likely existed. *See, e.g., Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 283 (2006) (enforcing anti-lien provision of Medicaid Act, 42 U.S.C. § 1396p, mandating that "[n]o lien may be imposed against the

property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan").[12] The present cases do not fall into this category as they involve no substantive federal right, whether implied, express, or assumed.

The second category includes cases in which preemption is asserted as a defense, rather than as a standalone cause of action. Such defenses are raised in one of two ways: either (1) the party is a defendant in a civil proceeding, such as a tort case or a local enforcement action, and the party raises preemption as an affirmative defense to liability in that case;[13] or (2) the party is a plaintiff in a lawsuit filed to forestall future state (or local) enforcement of state (or local) regulation of the party's conduct, and the party asserts a preemption defense on an anticipatory basis before such enforcement has occurred.[14] Such cases

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[12] In addition, a number of this Court's preemption cases involved statutes expressly preempting state law or prohibiting state regulation, statutory language that may supply the congressional intent needed to support an implied right of action. *See, e.g., Cuomo v. Clearing House Ass'n, L.L.C.*, 129 S. Ct. 2710 (2009) (NBA); *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364 (2008) (FAAAA); *Watters v. Wachovia*, 550 U.S. 1 (2007) (NBA); *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005) (FIFRA); *Engine Mfrs. Ass'n v. South Coast Air Quality*, 541 U.S. 246 (2004) (CAA); *Shaw*, 463 U.S. 85 (ERISA).

[13] *See, e.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

[14] *See, e.g., Cuomo*, 129 S. Ct. 2710; *Chamber of Commerce of the United States v. Brown*, 128 S. Ct. 2408 (2008); *Rowe*, 552

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are easily harmonized with *Sandoval* and *Gonzaga* because they do not involve a standalone cause of action to enforce federal law, but instead involve preemption solely as a defense to state regulation of a defendant's (or putative defendant's) conduct. *See Wilderness Soc'y*, 581 F.3d at 1233 (McConnell, J., dissenting) (availability of preemption "defense" to state enforcement proceedings does not mean that anyone "can bring a freestanding preemption claim to enforce compliance with federal law, as if 'preemption' were a cause of action"). The present cases do not fall into this category, either: Medicaid beneficiaries and providers are not raising preemption as a defense to regulation of their conduct, but rather as a standalone cause of action to force the State to take affirmative action in order to conform the State's conduct with respondents' notions of what federal law requires.[15]

U.S. 364; *Watters*, 550 U.S. 1; *Engine Mfrs.*, 541 U.S. 246. Such cases typically are brought as declaratory judgment actions. In addition, a private cause of action may exist for the specific purpose of enjoining anticipated state enforcement proceedings. *See Va. Office for Protection & Advocacy*, 131 S. Ct. at 1642 (Kennedy, J., concurring); *Golden State*, 493 U.S. at 113, 119 (Kennedy, J., concurring); John Harrison, *Ex parte Young*, 60 Stan. L. Rev. 989, 997 (2008) (discussing bill in equity to "restrain proceedings at law"), *cited with approval*, 131 S. Ct. at 1642 (Kennedy, J., concurring).

[15] To the two categories of preemption cases identified above may be added a third: the federal government may sue to enjoin state law that purportedly is preempted by federal law. *See, e.g., Cuomo*, 129 S. Ct. at 2714; *see also Verizon Md., Inc. v. Public*

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Thus, the Ninth Circuit's creation of a standalone Supremacy Clause cause of action cannot be reconciled with the Constitution's structure or history, or with this Court's precedent. The Ninth Circuit's cause of action bears no resemblance whatsoever to the Framers' conception of the Supremacy Clause as a rule of construction to support nullification of state law as necessary to protect federal rights. Instead, the Ninth Circuit used the Supremacy Clause to create a cause of action that Congress itself declined to create, complete with retroactive damages *and* injunctive relief. *See Indep. Living* Pet. App. 29-37 (reversing district court's order to extent that it ordered purely prospective relief, and authorizing retroactive relief as well); *id.* at 46-47 ("Independent Living was entitled to money damages for the Director's past conduct.").[16] Because no such cause of action exists, the decisions at issue must be reversed.

Serv. Comm'n, 535 U.S. 635, 640-41 (2002) (federal government intervened in private lawsuit and filed petition for certiorari).

[16] Although the Ninth Circuit rejected the proposition that retroactive damages were barred by the State's immunity (a holding that California disputes but does not challenge at this time), the court never addressed the entirely separate question of the source of a court's authority to award money damages in a preemption case. There is none.

B. Cases Involving Spending Clause Legislation are Particularly Inappropriate for the Supremacy Clause

Moreover, Spending Clause legislation is a particularly inappropriate context for raising up standalone causes of action that Congress declined to create. Principles of supremacy, and of preemption generally, have no application to allegations that a state has failed to satisfy a federal funding condition.

The relationship between the federal and state governments with respect to Spending Clause legislation such as the Medicaid Act is defined not by the supremacy of federal law, but by the terms of the quasi-contractual agreement between the state and federal governments. *See Pennhurst*, 451 U.S. at 17; *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Through the Spending Clause, Congress may entice the States to accept obligations that it may not directly mandate. *N.Y. v. United States*, 505 U.S. 144, 166-67 (1992). Thus, in the Spending Clause context, it is a state's voluntary agreement to be bound, rather than the inherent supremacy of federal law, that obligates a state to comply with any federal requirements.[17]

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[17] Congress *could* have included within that agreement a right for private parties to enforce § 30(A), as it has done for other provisions of the Medicaid Act, but it did not do so. *See, e.g., Doe v. Kidd*, 501 F.3d 348 (4th Cir. 2007) ("reasonable promptness" and "freedom of choice," 42 U.S.C. §§ 1396a(a)(8), (a)(23)), *cert. denied*, 522 U.S. 1243 (2008); *Harris v. Olszewski*, 442 F.3d

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The remedy for any noncompliance with respect to the Medicaid Act, therefore, is supplied not by the Supremacy Clause, but by the terms of the State's contract with the federal government. And that remedy is clearly and unambiguously set forth in a statute: the Secretary of HHS is authorized to withhold federal financial participation in cases of noncompliance. *See* 42 U.S.C. § 1396c; *see also* 42 C.F.R. § 430.35. Indeed, the Medicaid Act and its implementing regulations anticipate that instances of noncompliance may arise. And they expressly contemplate repayment of disallowed funds rather than negation of the State's action (assuming the State does not opt voluntarily to comply). *See* 42 C.F.R. §§ 430.33(c)(3), 430.35(d), 430.42(a),(d), 430.48.

The Supremacy Clause cannot be used to "invalidate" or declare "null and void" a state's Medicaid payments, because a state is free to retain its (purportedly noncomplying) payment scheme. In enacting Medicaid, Congress did not strip the States of their power to regulate, but merely imposed conditions for

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456 (6th Cir. 2006) ("freedom of choice," 42 U.S.C. § 1396a(a)(23)); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) ("making medical assistance available," 42 U.S.C. § 1396a(a)(10)); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004) (EPSDT services for recipients under the age of twenty-one, 42 U.S.C. §§ 1396a(a)(10)(A), 1396d(a), 1396d(r)(5)); *Beeker v. Olszewski*, 415 F. Supp. 2d 734 (E.D. Mich. 2006) (no denial of service based on inability to pay, 42 U.S.C. § 1396o(e)); *Meachem v. Wing*, 77 F. Supp. 2d 431 (S.D.N.Y. 1999) (fair hearings, 42 U.S.C. § 1396a(a)(3)).

the receipt of federal funds. Consistent with the voluntary nature of the Spending Clause contract, if a state fails to comply with federal Medicaid law, the state faces a choice: it can either continue to apply its law (and face federal enforcement), or it can bring its action into compliance with federal law. *See Pennhurst*, 451 U.S. at 28-30 & n.23. Simply put, if a state fails to comply with a federal condition for receiving federal funding, the state is not in "conflict" with federal law, as Congress expressly anticipated that such noncompliance could occur, and provided the remedy. 42 U.S.C. § 1396c.

Respondents thus seek to apply the Supremacy Clause where it does not belong. As discussed *supra* Part II.A, the Supremacy Clause was adopted to protect Congress's exercise of power particularly with respect to commerce and treaties – areas in which Congress may exercise exclusive regulatory (i.e., preempting) authority. *See Gibbons*, 9 Wheat. at 199-200 ("[W]hen a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."). State economic regulations that affect interstate or international commerce may raise special concerns – i.e., the potential to frustrate the national purposes for which the Union was formed – that justify less judicial deference than other forms of state action. By contrast, a state's purported failure to satisfy a voluntary federal funding condition, and the risk that it may forfeit federal funding as a result,

does not frustrate the national purposes for which the Union was formed.[18]

C. Respondents Cannot Overcome Prudential Standing Limitations to Assert Any Claims They May Have

Even if respondents somehow could identify a vehicle for their arguments, their claims would be barred by three separate strands of prudential standing jurisprudence. Prudential standing "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (citations omitted). Like the requirements for private lawsuits set forth in *Cort* and *Gonzaga*, prudential standing principles protect the judiciary from becoming embroiled in issues and disputes that properly belong to another branch. *Warth*, 422 U.S. at 500; *Valley Forge Christian*

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[18] Put another way, the Framers anticipated that the Supremacy Clause would operate to prevent state interference with Congress's exercise of its *enumerated powers under the Constitution*. *The Federalist* No. 33, at 161 ("It will not, I presume, have escaped observation, that it *expressly* confines this supremacy to laws made *pursuant to the Constitution*") (Alexander Hamilton); *see also* Story, *supra*, § 1831, at 694 ("It will be observed, that the supremacy of the laws is attached to those only, which are made in pursuance of the constitution."). No one has alleged that California has prevented the exercise of, or otherwise interfered with, Congress's authority under the Spending Clause. Congress remains free to spend – or withhold – its money on the Medicaid program, notwithstanding any purported violation by a state of a funding condition.

College v. Americans United for Separation of Church & State, 454 U.S. 464, 474 (1982). Although the Ninth Circuit did not reach these issues overtly, in three separate decisions in the *California Pharmacists* appeals, the court expressly rejected the proposition that *anything* more than Article III standing is required to assert a Supremacy Clause claim. *Cal. Pharm.* Pet. App. 46 (a plaintiff pursuing a Supremacy Clause Claim does not need a federally created "right," "but *need only satisfy traditional standing requirements*" (emphasis added)); *see also id.* 32-33, 38-39.[19] This is because, the court explained, "the cause of action is one to enforce the proper constitutional structural relationship between the state and federal governments and therefore is not rights based." *Cal. Pharm.* Pet. App. 47; *see also id.* 32-33, 38-39. Rather, according to the Ninth Circuit, anyone can act as a "private enforcer[] of the Supremacy Clause," irrespective of their "specific relationship" to the federal statute at issue. *Cal. Pharm.* Pet. App. 48.

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[19] Citing *Warth v. Seldin*, DHCS argued in two appeals (*California Pharmacists* and *Independent Living IV*) in the Ninth Circuit that prudential standing principles barred respondents' claims because they did not assert any "rights" of their own. Defendant-Appellant David Maxwell-Jolly's Opening Brief 30-33, No. 09-55692, Docket Entry No. 12 (9th Cir. June 19, 2009); Defendant-Appellant's Opening Brief 22 n.10, No. 09-55532, Docket Entry No. 11 (9th Cir. May 19, 2009). In *Santa Rosa*, DHCS asserted that providers' claims are barred by the zone-of-interest component of prudential standing. Appellant's Opening Brief 36, No. 09-17633, Docket Entry No. 6 (9th Cir. Dec. 17, 2009).

The same defects that doom respondents' claims under *Cort* and *Gonzaga* also bar their claims under prudential standing principles.

First, respondents cannot satisfy the requirement that their lawsuits seek to vindicate their own rights, rather than those belonging to a third party. *See Warth*, 422 U.S. at 499 (prohibition against "rest[ing] [a] claim to relief on the legal rights or interests of third parties"). Here, lacking any legally enforceable right themselves, respondents seek instead to enforce the undisputed right of a third party – the United States government – to hold California to its Medicaid obligations. But the federal government is the best proponent of its own rights. 42 U.S.C. § 1396c; *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). Respondents' attempt to enforce an obligation owed not to them, but to the federal government, thus runs directly afoul of the prohibition against resting a claim entirely on the rights of third parties. *See, e.g., Wilderness Soc'y*, 632 F.3d at 1170-72 (prudential standing principles barred lawsuit by environmental organizations seeking to enforce the federal government's property rights).

Second, the providers' claims do not "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Valley Forge*, 454 U.S. at 475; *see also Bennett*, 520

U.S. at 163.[20] There is no indication that Congress intended § 30(A) to protect providers' interests in Medicaid rate-setting. *See Sanchez*, 416 F.3d at 1059-60; *see also supra* Part I.C (discussing congressional intent to preclude suits). Accordingly, their claims are barred on this independent basis.

Third, the Ninth Circuit's conception of Medicaid providers as "private enforces of the Supremacy Clause" runs afoul of the prohibition against private lawsuits premised on "generalized grievances." A claim to "enforce the proper structural constitutional relationship between the state and federal governments," *Cal. Pharm.* Pet. App. 47, which is devoid of any judicially cognizable injury, is an archetypal generalized grievance. *See Valley Forge*, 454 U.S. at 483-84 ("This Court repeatedly has rejected claims of standing predicated on '"the right, possessed by every citizen, to require that the Government be administered according to law."'"); *see also Warth*, 422 U.S. at 499-500; *Schlesinger*, 418 U.S. at 223-25.

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California's Medicaid program has lost over a billion dollars since the Ninth Circuit first recognized a Supremacy Clause cause of action to enforce § 30(A)

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[20] Medicaid beneficiaries also do not fall within the "zone of interests" that § 30(A) was designed to protect, as the statute is concerned with ratemaking in the aggregate rather than with the rights of beneficiaries. *See Sanchez*, 416 F.3d at 1059-60. However, DHCS did not make this argument below.

in *Independent Living I*, and California is losing tens of millions more each month that injunctions issued pursuant to that authority remain in place. In addition to costing California enormous sums of mōney, the lawsuits have interfered with the centralized administrative enforcement process created by Congress for holding the States to their Medicaid obligations. None of these injunctions should ever have issued, because these disputes belong not in the courts but before HHS, as Congress intended. The Court should reject respondents' efforts to invoke the Supremacy Clause to effectuate an end-run around congressional intent and this Court's decisions in *Gonzaga*, *Sandoval*, and *Cort*. And it should clarify that any remedy for a state's purported breach of a funding condition must be provided by Congress, through the legislation it enacts, rather than by the Constitution.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

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Respectfully submitted,

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